IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

IN THE MATTER OF THE CARE AND TREATMENT OF DESI EDWARDS,	)	**Case No. ED78858**
Respondent/Appellant,	)	

Appeal from the Circuit Court of St. Louis City
State of Missouri
The Honorable Dennis Schaumann, Judge

Respondent's Brief

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Jurisdictional Statement

Appellant, Desi Edwards, was tried in the Circuit Court of the City of St. Louis, a jury determined him to be a sexually violent predator, he was remanded to the custody of the Missouri Department of Mental Health for treatment, and he now appeals from that determination pursuant to § 632.480[1]. Edwards attacks the constitutionality of that statute in Points I, II, and VII, on grounds of lacking a volitional impairment requirement, violating equal protection, and violating due process, respectively. Assuming Edwards' arguments on those points present constitutional claims that are not real and substantial, Edwards' appeal does not involve any of the matters reserved for the exclusive jurisdiction of the Supreme Court of Missouri, and therefore this appeal falls within this Court's general jurisdiction. Article V, § 3, Missouri Constitution (as amended 1982); *see*, *e.g.*, *Hampton Foods, Inc. v. Wetterau Finance Co.*, 831 S.W.2d 699, 701 (Mo. Ct. App. E.D. 1992).

[1] All references are to RSMo 2000, unless otherwise indicated.

Statement of Facts

On November 24, 1999, respondent, the State of Missouri, filed a petition for civil commitment of appellant, Desi Edwards, pursuant to § 632.480, et. seq. (L.F. 8-18). On October 2-5, 2000, the cause was tried before a jury in the Circuit Court of the City of St. Louis, the Honorable Dennis Schaumann, presiding (Tr. 148, 465). Edwards disputes the sufficiency of the evidence to support his order of conviction. Viewed in the light most favorable to the jury's decision, the record shows the following.

On June 10, 1989, Edwards had been staying at his sister's house for one or two days (Tr. 159, 248). Another woman, Letha Jones, and her one-year-old baby were also staying at the house (Tr. 159-60). At about 4:30 a.m., Ms. Jones awoke to hear her baby crying, went into the room, and found Edwards standing over the baby with his pants down, rubbing his penis against the baby's vagina (Tr. 160). Ms. Jones called the police (Tr. 160). When they arrived, she was "highly upset" and "angry" (Tr. 161). She told them what happened, and based on that information, they arrested Edwards (Tr. 161). Edwards told an officer, "Letha's lying on me" (Tr. 162).

On November 9, 1989, Edwards was painting a house (Tr. 188). An eight-year-old girl, Sylvia Foster, was in an upstairs room when Edwards found her (Tr. 194). He took her to the basement, took off her clothes, covered her mouth to muffle her screams, and raped her (Tr. 167, 194-95, 199-200). Sylvia hit and kicked Edwards, but he continued to rape her for several minutes (Tr. 167, 194-95). Sylvia's grandmother called her and Edwards, and Edwards ran out of the house, saying, "that's a penitentiary crime" (Tr. 188-89). The grandmother examined

Sylvia, saw that her vagina was bloody, and took her to the hospital (Tr. 190). Medical evidence established that Sylvia's hymen had been torn (Tr. 250-51).

On July 13, 1990, Edwards pled guilty to the rape, and was sentenced to ten years of imprisonment (Tr. 179, 209).

During his confinement, Edwards only completed the first half of the sex offender treatment program (Tr. 203-205, 252-53). He was offered the opportunity to enter the program again, but he refused (Tr. 253).

On December 1, 1996, Edwards was paroled to a half-way house (Tr. 225). While there, he completed a drug treatment program, and began attending counseling for sex offenders (Tr. 213-14, 229). Edwards was released from the half-way house in April of 1997, and by October he had moved, refusing to tell his parole officer where he was living, had starting using marijuana, and had stopped attending sex offender counseling (Tr. 215-17, 222, 230). He was ordered back into the half-way house by December 1997 (Tr. 224, 233). By December 1998, he had violated the rules of the half-way house by testing positive for cocaine, marijuana, and alcohol on different occasions, and he was then sent back to prison (Tr. 233-36).

After the state filed a petition to commit Edwards, Dr. William Logan, a psychiatrist, reviewed Edwards' records and interviewed him to assess whether Edwards had a mental abnormality which would make it more likely than not that he would rape children (Tr. 239-41, 246-60). Although Edwards had told other people details about raping Sylvia, he told Dr. Logan that he could not remember either sexual assault because he had been intoxicated at the time, and that he thought he had been "set up" (Tr. 262-63). Dr. Logan found that Edwards had

a mental abnormality, pedophilia, which abnormality caused him to rape children when children were available and he had taken intoxicants (Tr. 266, 269-71). He found that, given Edwards' mental abnormality, history of continuous drug abuse, failure to complete sex offender treatment, denial that the sexual assaults occurred, and the fact that he sexually assaulted two children in under 5 ½ months, it was more likely than not that Edwards' mental abnormality of pedophilia would cause him to rape other children upon release (Tr. 268-74). He testified that there was a "pretty high risk," greater than not, that Edwards would rape again if released without treatment (Tr. 294).

In his own case, Edwards called Dr. Richard Scott, a psychologist, who testified that Edwards had a mental abnormality of anti-social personality disorder (Tr. 305, 315). He said he did not diagnose Edwards with pedophilia because the sexual assaults had taken place just over five months apart instead of six months apart, but that Edwards met all the other criteria for the diagnosis of pedophilia (Tr. 325-26). He testified that he gave Edwards two tests to determine the chance that he would again rape children upon release (Tr. 331-32). He said that on one test which considered sixteen factors that make it more likely a person will reoffend, Edwards had all sixteen factors, which meant that there was a 70-78% chance that he would rape children within four-to-six years of his release (Tr. 346, 409, 414-15). He said that he gave Edwards another test which considered only four factors (Tr. 335). He said that one of the factors was prior history of sexual assaults, and he did not count either sexual assault in deciding Edwards had no such history, and therefore no risk for this factor (Tr. 337-38). He said that another factor was Edwards' age, and that even though he was twenty-eight years old,

risk only gradually decreased with age, and a twenty-five year old would be high risk, he assessed Edwards at no risk for this factor (Tr. 338-39). On the third factor, gender of the victims, he assessed Edwards at low risk, because he had raped girls instead of boys (Tr. 339). On the fourth factor, he assessed Edwards at high risk, because the victims were strangers to him (Tr. 339-41). Using that test, Dr. Scott decided that Edwards only had one of the four risk factors, and therefore only a one-in-twenty chance of being convicted of another sexual offense if released (Tr. 341). Dr. Scott concluded that Edwards had a mental abnormality, but that abnormality did not make it more likely than not that Edwards would again rape children if released without treatment (Tr. 315).

At the close of the evidence, instructions, and arguments of counsel, the jury found Edwards to be a sexually violent predator (Tr. 467). The court ordered that Edwards be committed to the Department of Mental Health for treatment (Tr. 469-70). This appeal follows.

Points Relied On

I.

The trial court did not err in denying appellant's motion for a directed verdict nor his objections to Instruction 6 because §§ 632.480-513 do not violate the due process clauses of the constitutions of Missouri and the United States in that under those clauses the state may place a person in involuntary custodial treatment if he has a mental abnormality causing dangerousness.

In re Gordon, 10 P.3d 500 (Wash.App. 2000)

Foucha v. Louisiana, 504 U.S. 71 (1992)

Kansas v. Hendricks, 521 U.S. 346 (1997)

State v. Revels, 13 S.W. 3d 293 (2000)

§ 191.910, RSMo (2000)

§ 632.380, RSMo (2000)

§ 632.480(5), RSMo (2000)

§ 632.483.4, RSMo (2000)

§ 632.484.4, RSMo (2000)

Minn. Stat. § 526.09 (1992)

Minn. Stat. § 253B.02 subd 18c

II.

The trial court did not err when it denied appellant's motion to dismiss the petition because §§ 632.480-513 do not violate the equal protection clauses of the constitutions of Missouri and of the United States in that he failed to identify any similarly situated person who would be subjected to different treatment and the legislature may constitutionally distinguish between sexually violent predators and all others who have mental abnormalities that may or may not render them dangerous.

State ex rel. Pearson v. Probate Court of Ramsey County, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*. 309 U.S. 270 (1940)

State v. Kee, 510 S.W.2d 477 (Mo. 1974)

Lloyd v. Dollison, 194 U.S. 445 (1904)

§ 632.480-513, RSMo (2000)

§ 632.480(5), RSMo (2000)

§ 632.495, RSMo (2000)

Minn. Stat. § 253B.02 subd 18b

III.

The trial court did not err in denying Edwards' motion for immediate release when his first trial ended with a hung jury because § 632.495 requires that, upon a mistrial, the person must be held in a secure facility until another trial is conducted.

Newman v. Ford Motor Co., 975 S.W.2d 147 (Mo.banc 1998)

Murray v. Mo. Highway & Transp. Comm'n, 37 S.W.3d 228 (Mo.banc 2001)

Black's Law Dictionary, Sixth Edition, 1990

§ 494.490, RSMo (2000)

§ 632.495, RSMo (2000)

IV.

The trial court did not err, plainly or otherwise, in denying Edwards' motion to dismiss alleging lack of standing because the recommendation of the multidisciplinary committee (MDT) is irrelevant to whether the Attorney General has standing to proceed in that § 632.486 allows the Attorney General to file a petition seeking commitment upon a majority vote of the prosecutor's review committee.

Newman v. Ford Motor Co., 975 S.W.2d 147 (Mo.banc 1998)

Murray v. Mo. Highway & Transp. Comm'n, 37 S.W.3d 228 (Mo.banc 2001)

§ 623.480, RSMo (2000)

§ 632.483, RSMo (2000)

§ 632.483.1, RSMo (2000)

§ 632.483.4, RSMo (2000)

§ 632.483.5, RSMo (2000)

§ 632.486, RSMo (2000)

V.

The trial court did not err in denying Edwards' motion for a directed verdict because the evidence was sufficient to establish that Edwards has a mental abnormality making it more likely than not that he will rape children if released in that the evidence showed that Edwards had mental disorders of pedophilia and anti-social personality disorder and that these conditions cause him to rape children under circumstances when he has used intoxicants and children are available to him.

Skinner v. Thomas, 982 S.W.2d 685 (Mo.App. E.D. 1998)

§632.480(5)

VI.

The trial court did not abuse its discretion in allowing Officer Paul Saulter to testify to statements made by Letha Jones because the statements were admissible under the excited utterance exception to the hearsay rule in that Ms. Jones made the statements while still under the stress of seeing Edwards attempting to rape her daughter.

State v. Williams, 673 S.W.2d 32 (Mo. 1984)

State v. White, 621 S.W.2d 287 (Mo. 1981)

State v. Boyd, 669 S.W.2d 232 (Mo.App. 1984)

State v. Wilson, 719 S.W.2d 28 (Mo.App.W.D. 1986)

VII.

The trial court did not abuse its discretion in quashing Edwards' subpoenas of the members of the MDT and in refusing to allow their testimony that they determined Edwards was not a sexually violent predator because their testimony was not admissible in that it could not assist the jury. In any event, Edwards was not prejudiced.

Bowman v. McDonald's Corp., 916 S.W.2d 270 (Mo.App.W.D. 1995)

Guzman v. Hansen, 988 S.W.2d 550 (Mo.App.E.D. 1999)

State v. Clements, 789 S.W.2d 101 (Mo.App.S.D. 1990)

Tyrrell v. Francka, 951 S.W.2d 685 (Mo.App.S.D. 1997)

§ 490.065.1, RSMo (2000)

§ 632.483, RSMo (2000)

§ 632.483.5, RSMo (2000)

§ 632.484, RSMo (2000)

§ 632.484.4, RSMo (2000)

§ 632.489.4, RSMo (2000)

VIII.

The trial court did not plainly err in allowing the state to call Edwards to the stand because this did not violate his Fifth Amendment right to be free from self-incrimination in that this right does not apply to civil proceedings such as this trial. In any event, Edwards has not shown manifest injustice.

Guess v. Escobar, 26 S.W.2d 235 (Mo.App.W.D. 2000)

Allen v. Illinois, 478 U.S. 364, 106 S.Ct. 2988, 92 L.Ed.2d 296 (1986)

Kansas v. Hendricks, 521 U.S. 346 (1997)

Emery v. Wal-Mart Stores, 976 S.W.2d 439 (Mo.banc 1998)

Supreme Court Rule 84.13(c)

§ 623.480-513

IX.

The trial court did not plainly err in not dismissing Edwards' case, *sua sponte*, after the St. Louis City circuit attorney sent an assistant circuit attorney to serve on the prosecutor's review committee in her place because this action complied with § 632.483.5 in that prosecutors may act through their assistants. In any event, the statutory language is not mandatory, and Edwards did not suffer manifest injustice.

Guess v. Escobar, 26 S.W.2d 235 (Mo.App.W.D. 2000)

J.A.D. v. F.J.D., 978 S.W.2d 336 (Mo.banc 1998)

State v. Tierney, 584 S.W.2d 618 (Mo.App. W.D. 1979)

State v. Hoover, 719 S.W.2d 812 (Mo.App. W.D. 1986)

Supreme Court Rule 84.13(c)

§ 56.151

§ 56.180

§ 56.200

§ 56.240

§ 56.430

§ 56.540

§ 56.550

§ 632.483.5, RSMo (2000)

Argument

I.

The trial court did not err in denying appellant's motion to for a directed verdict nor his objections to Instruction 6 because §§ 632.480-513, do not violate the due process clauses of the constitutions of Missouri and the United States in that under those clauses the state may place a person in involuntary custodial treatment if he has a mental abnormality causing dangerousness.

For his first point on appeal, Edwards claims that, in order to commit him, the state was required to prove that he lacked the volitional capacity to control his actions (App.Br. 20). Edwards claims that the state did not prove a lack of volitional capacity, and therefore the trial court erred in overruling his motion for a directed verdict, and abused its discretion in refusing his instructions that would have required the jury to find lack of volitional capacity before the jury found him a sexually violent predator (App.Br. 20). Edwards claims that § 632.380 is unconstitutional insofar as it does not require the state to prove lack of volitional capacity (App.Br. 20). In this point, Edwards does not argue that the evidence was insufficient to meet the statutory requirements.

1. Facts

At trial, the state proved that Edwards had attempted to rape a one-year-old baby, and had raped an eight-year-old girl (Tr. 160, 187, 194-95, 199-200). The testimony of Dr. Logan established that appellant had a mental abnormality of being attracted to children, and his history showed that he acted on that attraction when children were available and he had taken

intoxicants (Tr. 266, 269-71). Dr. Logan said that Edwards' mental abnormality, coupled with his history, created a "pretty high risk," greater than not, that Edwards would again rape children if released without further treatment (Tr. 294).

Edwards' own expert, Dr. Scott, testified that Edwards had a mental abnormality, and on one test of likelihood of reoffending, he had all sixteen factors, giving him a 70-78% chance of being convicted of another sexual offense within four-to-six years (Tr. 315, 346, 409, 414-15).

The evidence also showed that Edwards had never completed sex offender treatment, had refused opportunities to receive sex offender treatment while in prison, and had stopped seeing his sex offender counselor while on parole (Tr. 216, 253, 272). Edwards denied that he had a problem with being attracted to children, and it "concerned" Dr. Logan that after all the treatment Edwards had already had, he still could not even admit that he had a problem (Tr. 262). Edwards did complete a drug rehabilitation program, but when he was released from the halfway house, he began using cocaine, marijuana, and alcohol again, and he was still addicted to these drugs at the time of trial (Tr. 173-74, 213, 233-36). Thus, he had an untreated attraction to children, and an unsuccessfully treated drug addiction.

2. Involuntary custodial treatment is constitutionally permissible for those whose mental abnormalities make them likely to commit acts of sexual violence, not merely for those whose mental abnormality causes complete volitional impairment.

The constitutional test for involuntary commitment has long consisted of two elements: dangerousness and a serious mental problem. *See, e.g., In re Gordon*, 10 P.3d 500, 502-03 (Wash.App. 2000), *citing Kansas v. Hendricks*, 521 U.S. 346 (1997). The Missouri Supreme Court recognized that test most recently in *State v. Revels*, 13 S.W. 3d 293 (2000). There, the court considered arguments that the Supreme Court in *Foucha v. Louisiana*, 504 U.S. 71 (1992), had modified the traditional test, and concluded that it had not. *Revels*, 13 S.W.3d at 296. Here, Edwards challenges that conclusion, arguing for an additional constitutional requirement in proceedings involving the involuntary custodial treatment of sexually violent predators. In his view, the Constitution of the United States precludes involuntary custodial treatment of sexually violent predators except for those who entirely lack "the volitional capacity to refrain from predatory acts" (App.Br. 25, emphasis omitted), regardless of whether they have mental abnormalities that make them dangerous. This Court should reject the claim that the Constitution requires something more than proof of a mental abnormality, dangerousness, and causation.[2]

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[2] That question is pending before the Missouri Supreme Court in *In re Thomas*, No. 83186, and before the U.S. Supreme Court in *Kansas v. Crane*, No. 00-957.

The Missouri Supreme Court's conclusion in *Revels* was consistent with the opinion of the U.S. Supreme Court in *Foucha*. In *Foucha*, the Court repeatedly stated that the due process test for civil commitment required that the state "prove by clear and convincing evidence" just two things: "that the individual is mentally ill and dangerous." 504 U.S. at 80; *see also id*. at 75-76, 86. The Court in *Foucha* prohibited merely "the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others." 504 U.S. at 83, *quoted in Revels*, 293 S.W.3d at 296. Thus, in *Revels*, the Missouri Supreme Court found that *Foucha* allows the continued custodial treatment of a person who "has, and in the reasonable future is likely to have, a mental disease or defect rendering the person dangerous to self or others." 293 S.W.3d at 296.

The language used in *Revels* recognizes that the two traditional parts of the test, mental illness and dangerousness, cannot be applied independently: "Continued custodial treatment" is permissible if the mental abnormality "render[s] the person dangerous." *Id*. Considering a statute parallel to the one at issue here, the Washington Court of Appeals recently phrased the constitutional test in the same way, insisting on a mental illness, dangerousness, and a link between the two. That court upheld Washington's sexually violent predator statute because it "requires the State to prove . . . that a causal link exists between an alleged sexual predator's mental abnormality or personality disorder and the likelihood that he or she will engage in predatory acts of sexual violence in the future." *In re Gordon*, 10 P.3d at 503. The Missouri sexually violent predator law should similarly be upheld. Like the unconditional release statute at issue in *Revels*, it meets the constitutional test.

Edwards does not argue that the Missouri law fails the traditional test. Rather, he argues that the U.S. Supreme Court has added another requirement to the test when the involuntary custodial treatment of a sexually violent predator law is at issue. He claims that in addition to findings of mental abnormality, dangerousness, and causation, the abnormality must make it impossible for the person to control his behavior (App.Br. 25). Thus, Edwards would limit the scope of the statute cases in which the jury finds that the person cannot, rather than merely will not or find it difficult to, restrain his violent behavior. That claim was rejected in Washington, where the court of appeals confirmed that *Hendricks* does not require that a jury "make a specific finding that the mental abnormality or personality disorder makes it impossible, or at least difficult, for an individual to control his dangerous behavior." *In re Gordon*, 10 P.3d at 503.

In arguing for this new, stricter test, Edwards cannot rely on any holding of the U.S. Supreme Court – though he purports to do so, citing repeatedly to *Hendricks*. *See* App.Br. 25-28. In fact, in *Hendricks*, the Supreme Court was never asked whether the Kansas law (which is substantially similar to both the Washington and Missouri statutes) could be applied to someone who was not completely volitionally impaired. Edwards cannot contest that Hendricks "conceded at his hearing that he *could not control* his urge to sexually molest children and the only sure way he could keep from continuing his deviant behavior was 'to die.'" 521 U.S. at 760.[3] Thus the Supreme Court did not decide whether a sexually violent

[3] Hendrick's claim of complete inability to control his conduct is doubtful; surely not

predator law could extend to persons who may have some control over their behavior. What Edwards thus relies on is not a holding; it is the Court's statements about the undisputed facts of the *Hendricks* case. Or to use the language of the Arizona Supreme Court, Edwards "read[s] *Hendricks* too narrowly and intermingle[s] fact-specific comments in that decision with principles central to its holding." *In re Leon G.*, 26 P.3d 481, 484 (Ariz. 2001). The language that Edwards cites does not purport to define either an existing or a new constitutional rule. If it changed the traditional two-part test at all, *Hendricks* did so by broadening the state's power to involuntarily commit individuals; the Court clarified that a condition defined as a "mental abnormality" was constitutionally sufficient to allow commitment, and the state's power to commit was not limited to conditions medically defined as "mental illnesses."

Unable to rely on the holding in *Hendricks*, Edwards instead turns to the decisions of two courts that have, like the Washington Court of Appeals, considered the "volitional impairment" question: *Kansas v. Crane*, 7 P.3d 285 (Kan. 2000), *cert. granted*, No. 00-957; and *In re Linehan*, 594 N.W. 2d 867 (Minn. 1999). Both courts carried the *Hendricks* dicta too far – though only the Kansas court carried it as far as Edwards suggests.

In *Crane*, the Kansas Supreme Court held that the constitution demands proof of complete volitional impairment. 7 P.3d at 290. Thus, the only person who can be

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even Hendricks abused every child with whom he came into contact, regardless of time, place, or audience. Thus, Hendricks and Edwards are simply at two points on the same spectrum of ability to control conduct.

constitutionally placed in involuntary custodial treatment is one who "cannot control his dangerous behavior." *Id*. For support, the court relied solely on the *Hendricks* dicta. *See id*. at 288-90. But again, such dicta is not sufficient to establish a new constitutional due process requirement. Moreover, the Kansas court did not articulate a rationale for its rule. It failed to articulate any meaningful, much less constitutionally significant, distinction between a person who *cannot* refrain from harmful behavior, and a person who, while suffering from a mental abnormality that leads to acts of sexual violence, *can* refrain from that behavior to some extent, but *will not*. Certainly such a distinction makes no sense to the victim of the next sexual offense. Nor does it make sense to the psychologist or psychiatrist; the mental abnormality merits treatment, regardless of whether it compels the patient to act out or merely makes it more likely than not that he will do so. Nothing in *Hendricks* suggests that the *Crane* line would make sense to the U.S. Supreme Court.

Certainly nothing in *Linehan* suggests that there is any sense to the line drawn in *Crane* and urged by Edwards. In fact, the Minnesota court rejected that line and drew another.

Linehan began as a case arising under Minnesota's "sexual psychopath" law, which covers those persons who have "conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of his acts, or a combination of any such conditions, as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other

persons." Minn. State. § 526.09 (1992).[4] Some years before, the Minnesota Supreme Court had interpreted this language to require a finding that the person whose commitment was proposed had "an utter lack of power to control their sexual impulses." *State ex rel. Pearson v. Probate Court of Ramsey County*, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*. 309 U.S. 270, 272 (1940).[5] The state's initial effort to commit Linehan failed because the state did not make the requisite showing that he was completely unable to control his behavior. *In re Matter of Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*).

The Minnesota legislature then adopted a new law, providing for the commitment of "sexually dangerous persons." They are defined as persons who have "engaged in a course of harmful sexual conduct" (defined elsewhere in the statute) and have "manifested a sexual, personality, or other mental disorder or dysfunction," and as a result are "likely to engage in acts of harmful sexual conduct." Minn. Stat. 253B.02 subd. 18c. The Minnesota Supreme Court contrasted it with the prior law as interpreted in *Pearson*: "Commitment under the SDP Act does not require proof that the proposed patient is unable to control his or her sexual

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[4] The "sexual psychopath" law, though later amended, is now codified at Minn. Stat. § 253B.02 subd. 18b.

[5] The U.S. Supreme Court, in quoting the Minnesota Supreme court's interpretation of the statute, neither endorsed it nor gave it constitutional significance. Rather, the Court observed that the Minnesota court's interpretation of state law was "binding" upon the Court. 309 U.S. at 272.

impulses." *In re Linehan*, 557 N.W. 2d 171, 175-76 (1996) (*Linehan II*). The Act thus "created a new class of individuals eligible for civil commitment for treatment." *Id*. at 179.

Linehan challenged the law by arguing, in part, for the rule adopted by the Kansas Supreme Court in *Crane, i.e.*, that "an utter inability to control sexual impulses is required in order to satisfy the narrow tailoring demand of strict scrutiny." *Id*. at 180. The Minnesota Court nonetheless held the statute to be constitutional. *Id*. Walking through the steps required by strict scrutiny, the court first confirmed the state's compelling interests "in protecting the public from sexual assault" and "in the care and treatment of the mentally disordered." 557 N.W. 2d at 181, *citing In re Blodgett*, 510 N.W.2d 910, 914, 916 (Minn. 1994), and *Addington v. Texas*, 441 U.S. 418, 426 (1979). The court then held that those "intertwined" interests are served by the involuntary custodial treatment of sexually dangerous persons: "Treating sexual predators for the disorders that explain their dangerousness serves and falls within the state's interest in protecting the public from sexual assault." 557 N.W. 2d at 181. Finally, the court referred back to one of its own precedents, *Blodgett*, 510 N.W.2d at 916, where it had similarly concluded that "[s]o long as civil commitment is programmed to provide treatment and periodic review, due process is provided." 557 N.W. 2d at 181.

The court then turned to the last question in the strict scrutiny analysis: "whether the SDP Act is sufficiently narrow . . . to satisfy strict scrutiny." *Id*. The court recognized that the "leading United States Supreme Court case on the subject" was *Foucha*. The court then restated the *Foucha* holding: that a person "may be committed only so long as the patient is both mentally ill and dangerous." 557 N.W. 2d at 182, *citing Foucha*, 504 U.S. at 77-78,

Jones v. United States, 463 U.S. 354, 370 (1983), and *O'Connor v. Donaldson*, 422 U.S. 563, 574-75 (1975). The Minnesota court thus agreed with the Washington court in *Young*: an involuntary commitment statute meets constitutional requirements of due process if it affects only persons who are mentally ill, and who because of that illness are dangerous.

Linehan sought review by the United States Supreme Court, challenging the constitutionality of the Minnesota law. His petition was held pending a decision in *Hendricks*. Once *Hendricks* was decided, the Court did what it typically does in cases being held: granted the petition, vacated the Minnesota Supreme Court's decision, and remanded the case for consideration in light of *Hendricks*. 522 U.S. 1011.[6]

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[6] Edwards suggests that the Supreme Court's decision to grant the petition, vacate the decision below, and remand ("GVR") in light of *Hendricks* was "significant" (App.Br. 37). Perhaps, but its precise significance is far from clear. Certainly the GVR did "not amount to a final determination on the merits." *Henry v. City of Rock Hill*, 376 U.S. 776, 777 (1964). The significance of a GVR has been variously stated as indicating that the case "remotely involv[es] the principles laid down" in the decision being announced, *Goldbaum v. U.S.*, 348 U.S. 905, 906 (1955); that it is "not certain that a case was free from all obstacles to reversal on an intervening precedent," *Henry v. City of Rock Hill*, 376 U.S. 77 (1964); or that "the intervening decision has shed new light on the law which, if it had been available at the time of the [lower court's] decision, might have led to different results," *Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 26 (1978) (Stevens, J. dissenting). Evaluating the

On remand, the Minnesota Supreme Court addressed various arguments Linehan made based on *Hendricks*. *In re Linehan*, 594 N.W. 2d 867 (Minn. 1999) (*Linehan III*). When it reached substantive due process, the court considered and rejected Linehan's demand that the court follow the *Crane* approach and thus retreat from its conclusion that the constitution did not limit sexually violent predator laws to those who are "utterly unable" to control their behavior. *Id*. at 873 n. 3. The majority criticized the dissent for finding in the *Hendricks* dicta the rule later applied in *Crane*. *Id*. Thus the court refused to "insert[] the word 'totally' in front of the word 'control' whenever it refers to the Supreme Court's analysis of a person's ability to control his or her sexual impulses." *Id*. It is sufficient that a person's mental abnormality merely makes it "difficult . . to control his dangerous behavior." *Hendricks*, 521 U.S. at 358, *quoted at* 594 N.W. 2d at 873 n.3. A commitment law is constitutional, then, if it can be interpreted to allow only the "civil commitment of sexually dangerous persons who have engaged in a prior course of sexually harmful behavior and whose present disorder or dysfunction does not allow them to *adequately control* their sexual impulses, making it highly likely that they will engage in harmful sexual acts in the future." *Id*. at 876 (emphasis added). To put it another way, the Minnesota court concluded that the statute must be constitutionally limited to provide for the involuntary custodial treatment only of one who "demonstrates a lack of adequate control over his sexually harmful behavior." *Id*.

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significance of a GVR is particularly problematic without knowing the precise questions presented in the petition, which Edwards does not provide.

The question addressed in *Linehan* and *Crane* was recently considered in *In re Leon G.*, 26 P.3d 481 (Ariz. 2001). There, the Arizona Supreme Court rejected the argument that the Supreme Court in *Hendricks* imposed "'volitional impairment as a separate requirement for civil commitment statutes." *Id*. at 484. The Arizona court found in *Hendricks* the same two-part analysis that the Missouri Supreme Court used in *Revels*: "If the state establishes not only that a person is dangerous, but also that a mental illness or abnormality caused the dangerousness, the state has met its burden to show a lack of control." *Id*. at 485.

This question was also addressed recently in *In re Varner*, 2001 Ill. LEXIS 1433 (October 18, 2001). By the time he was twenty-eight years old, Varner had raped at least three children. He had refused treatment in prison, and denied committing the sexual assaults. Before his release, he was evaluated under the Illinois commitment statute, and psychologists diagnosed him as having pedopiliha and a personality disorder, a combination that created a substantial probability that he would reoffend if released. Varner challenged the constitutionality of the statute on grounds that it was "not limited to persons who lack volitional control over their behavior." The court found that, under *Hendricks*, the statutory requirement that the mental condition must affect the ability to control the conduct was sufficient to uphold the Illinois law. The court examined *Crane*, and found it "unpersuasive."

If a person can "adequately control" his behavior, then he will not fit the statutory definition of a "sexually violent predator" – *i.e.*, he will not be "more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility." § 632.480(5). Anything else is *in*adequate control. Thus, Missouri's law goes no further than the *Linehan*,

Leon G., and *Varner* rules would permit. But again, this Court need not decide whether that is true. The real test is still the two-part one articulated in *Foucha* and *Revels*, which Edwards never even suggests that the Missouri law fails.

i. Limiting interpretations are available in Missouri

In order to obtain a complete reversal rather than a remand, Edwards goes beyond a demand for a showing of complete volitional impairment and a retrial under that standard, and insists that the statute must be stricken in its entirety for failure to include such a limitation. He begins by discussing Missouri's severance law, § 1.140. That statute does not directly apply here, for it deals only with the question of whether to retain the remainder of a statute once a portion is deleted, not how to handle statutes that may be constitutionally applied to one person (one who is volitionally impaired) but not to another (one who can but will not refrain from violent acts).

Moreover, the analysis that Missouri courts have applied under that statute would not be helpful to Edwards. The statute requires the court "to preserve the nonoffending portions of the statute, unless we determine that the legislature would not have enacted the valid provisions without the void one." *Kilmer v. Mun*, 17 S.W. 3d 545, 553 (Mo. banc 2000). The question would be whether the legislature "would not have enacted" the statute if it applied only to those with complete (*Crane*) or partial (*Linehan*) volitional impairment. In this case, as in so many others, the "answer is rather obvious." *National Solid Waste Mgmt. Ass'n v. Director of the Dept. of Natural Resources*, 964 S.W.2d 818, 822 (Mo. banc 1998). It is absurd to argue that the legislature would prefer to release all mentally ill people likely to

commit sexually violent offenses rather than to commit at least the worst of them. There is no logical basis for Edwards' argument that the legislature would not have passed the statute if it would only have led to the custodial treatment of the worst of those the existing language sought to reach.

Certainly a contrary conclusion cannot be based, as Edwards suggests, on the fact that the statute defines "sexually violent predator" in one place, then refers back to that place repeatedly (App.Br. 32-33). Edwards has no precedent for the premise that repeated use of the term for which a limiting reading is proposed has any impact, much less a dispositive impact, on the availability of severance. And he provides no logical explanation for that claim. Indeed, the consistent use of a single, defined phrase is a legislative tool that should be encouraged, not discouraged by finding it to be the basis for precluding either severance or a limiting reading of the statute.

Edwards achieves no more by pointing to the pre-filing reviews in Missouri– both by the multidisciplinary committee and by the prosecutors' committee (App.Br. 32-33). *See* §§ 632.483.4 and 632.484.4. Though such reviews are absent from the statutes at issue in *Crane* and *Linehan*, Edwards' effort to attribute some significance to that absence fails. In fact, those statutes are largely parallel to the Missouri law, except that they leave the pre-filing review to a single prosecutor. Consistent with other Missouri statutes, the legislature has chosen here to place a check on the exercise of authority by the attorney general. *See, e.g.*, § 191.910. Such a check means nothing more than that the legislature wishes to restrain an overzealous attorney general by retaining a role for local prosecutors, or give additional

protections to those whose liberty is threatened by the statute. They do not show that the legislature would not have acted if the scope of the attorney general's authority were also limited by the constitution to something less than what the statute contemplates.

But again, the question here is not really one of severance; it is whether a limiting interpretation is possible. And *Linehan*, if not *Crane*, shows that it is. What this Court would have to do, in order to retain the law but adopt even the *Crane* interpretation, is no more difficult than what the Missouri Supreme Court did recently in *Oliver v. State Tax Commission*, 37 S.W. 3d 243 (Mo. banc 2001): to add a constitutional gloss to statutory language in a manner that prevents anyone's rights from being violated.

Certainly taking such a step is easier here than in was in *Linehan*. There, the court required proof of lack of adequate control despite a specific provision in the law stating that "it is not necessary to prove that the person has an inability to control the person's sexual impulses." Minn. Stat. § 253B subd. 18c(b). If Minnesota law can be so read, surely Missouri's could, if it were constitutionally required.

ii. The jury instruction submitted to the jury conformed to the statute

Edwards also argues that the jury was improperly instructed (App.Br. 37). But his argument is merely a reiteration of the ones addressed above. He does not suggest that Instruction 6 failed in any way to conform to the statute. Instead, he argues that the jury was required to find that he is "unable to control his actions, as was required by *Hendricks*." (App.Br. 40).

If complete volitional impairment were a constitutional or statutory requirement, then Edwards would be right; the jury instruction should reflect it. But as discussed above, there is no such constitutional requirement.

If inadequate ability to control behavior were a constitutional requirement, the instruction would be sufficient, because it, as the statute required, required the jury to find that appellant was "more likely than not to engage in predatory acts of sexual violence if he is not confined in a secure facility," and that he is likely to commit such acts as a result of his "mental abnormality." (Stipulation, Instruction 6).

iii. The record supports the jury's finding that Edwards could not adequately control his behavior, *i.e.*, that he was likely to commit further sexual violent acts unless placed in custodial treatment in a secure facility

Edwards challenges the sufficiency of the evidence to sustain his conviction in Point V, and this issue is addressed in more detail in Respondent's Point V. However, even if this Court were to apply either the *Linehan* or *Crane* standards, the evidence would still be sufficient to sustain the verdict.

In *Linehan*, the court found that there was sufficient evidence in the record to support the conclusion that Linehan "lacks adequate control over his harmful sexual impulses." *Id*. at 878. This fact was not shown by testimony on"volitional impairment;" rather, it was shown by Linehan's behavior. *See id*. 876-78. That behavior established Linehan's "impulsivity" and "lack of control."

As shown by Respondent's Statement of Facts and argument in Point V, there is similar evidence in this case. Edwards has two untreated mental abnormalities; the pedophilia causes his sexual attraction to very young children, and the anti-social personality disorder causes him to act impulsively without regard to the harm he causes (Tr. 266, 269-71, 315-19). Edwards continuously uses drugs, and his history shows that when he is intoxicated he rapes whatever children are available to him (Tr. 266-71, 173-74, 213, 233-36). Thus, under circumstances Edwards encounters frequently, being intoxicated and being around children, he lacks ability to keep himself from raping children.

Thus, even under the *Linehan* standard, the result here should be the same as in that case: a "holding that the [SVP] Act is constitutional and appellant's civil commitment under the [SVP] Act is appropriate." *Linehan III*, 594 N.W. 2d at 878.

Even if this Court were to apply the *Crane* standard, the evidence – that Edwards cannot control his pedophilia and anti-social personality disorder when he has access to children and is intoxicated, and that he has not yet been able to control his addiction to drugs, despite treatment – is sufficient to show that Edwards cannot control his behavior. If this evidence were insufficient, the remedy would be reversal, but only for a new trial, not with orders to dismiss. But again, neither the statute nor any Supreme Court precedent restricts involuntary custodial treatment to those with complete volitional impairment. Therefore, Edwards' point must fail.

II.

The trial court did not err when it denied appellant's motion to dismiss the petition because §§ 632.480-513 do not violate the equal protection clauses of the constitutions of Missouri and of the United States in that he failed to identify any similarly situated person who would be subjected to different treatment and the legislature may constitutionally distinguish between sexually violent predators and all others who have mental abnormalities that may or may not render them dangerous.

For his second point on appeal, Edwards claims that the trial court erred in denying his motion to dismiss, which alleged that §§ 632.480-513 violate the Equal Protection Clause (App.Br. 42). Edwards argues that other mentally ill people are given treatment in the least restrictive environment, but those whose mental abnormalities make it more likely than not that they will commit sexually violent offenses must be placed in a secure facility, and that there is no rational basis for this distinction (App.Br. 42).

"'Equal protection of the law means equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances.'" *Ex Parte Wilson*, 48 S.W. 2d 919, 921 (Mo. 1904), *quoting Brill's Cyclopedia of Criminal Law*, vol. 1, § 42. An equal protection claim can thus "only be sustained if the statute treats plaintiff in error differently from what it does others who are in the same situation as he." *Lloyd v. Dollison*, 194 U.S. 445, 447 (1904), *see Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 343, 109 S.Ct. 633, 637-38, 102

L.Ed.2d 688 (1989). Therefore, an equal protection analysis must begin by determining what class of persons is covered by the statute being challenged, and then must compare the law's treatment of that person to its treatment of the challenger.

The class of persons covered by the statute is straightforward: the law covers only those persons who have committed criminal sexual acts and who are then found beyond a reasonable doubt to have a mental abnormality which makes them "likely . . . to engage in predatory acts of sexual violence **if not confined in a secure facility.**" § 632.480(5) (emphasis added). Edwards disregards this clear statutory language in his argument. Instead, he argues his case as if the statute covered all those who have committed criminal sexual acts and are now likely to engage in predatory acts of sexual violence **unless treated in an outpatient setting.** But the statute cannot possibly be read that way. Edwards has been subjected to involuntary *custodial* treatment by the Department of Mental Health not merely because the jury found that he was "dangerous" or needed treatment, but because it found that he would be dangerous to others, not just to himself, unless subjected to treatment in a secure facility.

At its second step, equal protection analysis requires that Edwards identify someone who is similarly situated, and show that the law treats that person differently in some constitutionally significant sense. There he fails, for he never identifies anyone – by name, class, or hypothetical circumstance – who is similarly situated but treated differently. Again, his argument is that the state permits some persons civilly committed to be placed in community treatment, even if they are "dangerous" (App.Br. 44). For that proposition he cites § 632.365, which provides for treatment in the least restrictive environment. However, neither

that section nor any other Missouri statute says that someone who would be dangerous outside a custodial setting may still be placed outside a custodial setting. Certainly neither that nor any other Missouri statute suggests that someone who is "likely . . . to engage in predatory acts of sexual violence if not confined in a secure facility" could nonetheless be placed in community treatment. Thus, because § 632.480(5) requires the jury to find that a person will more likely than not engage in predatory acts of sexual violence if not confined in a secure facility, it is silly for Edwards to compare himself to a dissimilar group, those who have not yet been found to be dangerous (and yet would be confined if such a finding were made), and then complain that his disparate treatment violates equal protection. Thus, Edward's point must fail.

Edwards attempts to overcome the deficiencies in his argument by jumping to precedents dealing with classification of sexual offenders and suggesting that they prescribe a rule that those posing the threat of sexual violence cannot be treated differently from those who are also dangerous in non-sexual ways. However, the U.S. Supreme Court has long recognized that states have the ability, under the Constitution, in the course of drafting statutes dealing with civil commitments, to treat persons who pose threats of sexual violence due to mental conditions differently from others who are otherwise dangerous. For example, in *State ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 272 (1940), the Court upheld Minnesota's "psychopathic personality" law, which applies only to those persons who are "irresponsible for [their] conduct with respect to sexual matters." Minn. Stat. § 253B.02 subd. 18b, cited at 309 U.S. at 272. The Court rejected Pearson's equal protection claim, finding "no reason for doubt" that the legislature's decision to single out those threatening

sexual violence was constitutionally permissible. *Pearson*, 309 U.S. at 274-75. The Court said the issue was not whether the statute cuts a small group out of a larger one, but whether the statute could make a class out of the group as it did. *Id.* The Court found that the terms of the statute showed that the class was selected in terms of its danger to the community, and that the legislature was free to "confine its restrictions to those classes of cases where the need is deemed to be clearest. If the law 'presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.'" *Id.*

Applying that test, equal protection challenges to a variety of sexual offender and predator laws have been defeated. *E.g.*, *Peterson v. Gaughan*, 404 F.2d 1375, 1377-78 (1st Cir. 1968); *Martin v. Reinstein*, 987 P.2d 779, 795-99 (Ariz. App. 1999); *Trueblood v. Tinsley*, 366 P.2d 655, 659 (Colo. 1961); *Vanderhoof v. People*, 380 P.2d 903, 904 (Colo. 1963); *State v. Evans*, 245 P.2d 788, 790-91 (Idaho 1952); *State v. Little*, 261 N.W.2d 847, 850-51 (Neb. 1978). That the legislature "could have gone further" and required custodial treatment of persons who threaten the public safety in ways other than through sexual violence does not establish an equal protection violation.

Here, as in *Pearson* and its progeny, the legislature has chosen to "hit[] the evil where it is most felt." *Pearson*, 309 U.S. at 274-75. Although the absence of legislative history makes it impossible to cite to the precise reasons for the lines drawn here, it does not prevent this Court from finding a rational basis for the legislature's decision. In Missouri, as in Michigan, "[i]t is reasonable to presume that the legislature concluded that the need for such restraint as the statute imposes was greatest among that group of criminal psychopathic

persons apparently predisposed to transgressions against society; that is, those persons charged with other violations of the criminal law." *State v. Chapman*, 4 N.W. 2d 18, 24-25 (Mich. 1942). Thus, under the rule in *Pearson*, "[t]he legislature, in the exercise of its State police power and in its efforts to afford protection, could limit the scope of a legislative act to the eradication of evil where presumably the need is greatest, even though it might constitutionally have extended the operation of its enactment to a larger class." *Id*.

Rather than dealing with the "similarly situated" problem and with the rule in *Pearson*, which are fatal to his argument, Edwards opens his argument by citing *In re Young*, 857 P.2d 989, 1011 (Wash. 1993). There, the Washington Supreme Court cited another U.S. Supreme Court decision, one in which the test for evaluating different methods of committing or treating the mentally ill was articulated as whether the distinction being made has "some relevance to the purpose for which the classification is made." *Baxstrom v. Herold*, 383 U.S. 107, 110 (1966). Unlike *Pearson* and its progeny, the Court in *Baxstrom* did not deal with the statutory scheme in its entirety. Rather, it took that law apart, comparing little pieces of the specific law at issue to comparable pieces of the law regarding civil commitments generally. Thus, it held that Baxstrom was deprived of equal protection because he could not invoke "the statutory procedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York," and because he was committed "without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence." *Id*. at 110. In other words, he was deprived of two procedural

protections that were given to other persons subject to commitment. In sum, the Court felt that, though the distinction between sexual offenders and others may meet constitutional requirements for equal protection purposes generally, the distinctions did not justify depriving Baxstrom of these two specific procedural rights.

Obviously neither of those specific rights is at issue here, and *Baxstrom* does not state a general rule that precludes the kind of distinctions Missouri law makes. *See State v. Kee*, 510 S.W.2d 477, 480-82 (Mo. 1974) (*Baxstrom* did not prohibit treating mentally ill criminals differently from mentally ill persons who had not committed a criminal offense). Missouri's law gives Edwards the right to a jury trial at which both mental abnormality and dangerousness must be proven by the state. In fact, it gives him greater protection than it gives to civil committees generally: the state must make its case "beyond reasonable doubt," and the jury verdict must be "unanimous." § 632.495. Edwards does not challenge these or the other ways in which Missouri's sexually violent predator law gives him *more* protection than is allocated to civil committees generally. If there were someone who could challenge such procedures in the sexually violent predator law on equal protection grounds, it would be the person who is similarly situated (*i.e.*, equally dangerous absent custodial treatment) but not given the same protections.

Unable to rely on procedural differences in *Baxstrom*, Edwards focuses – as did the Washington court in *In re Young* – on a substantive application of the law: the issue of treatment location. But even there, he ignores the teaching of *Baxstrom*, for he does not consider "the purpose for which the classification is made." The "purpose for which the

classification" of sexually violent predators was made is obvious: to protect the public, not only by ensuring the most effective treatment of sexually violent predators, but by preventing them from gaining access to new victims while their treatment is under way. The risks of premature access to the public are dramatically demonstrated by the facts of *Linehan*. *See* 557 N.W. 2d at 175. Also, at Edwards' own trial, Dr. Logan testified that Edwards' sex offender treatment should be provided in a secure mental health facility because the intense discussion of sexual behaviors could "stir him up emotionally," making him more likely to commit further sexual offenses, particularly if he still used drugs (Tr. 255-56). The horrible nature of sexual offenses, the vulnerability of victims, and the nature of sex offender treatment itself makes the need for custodial treatment greater than it is for civil committees generally.

But again, this Court need never reach that point in the analysis. Edwards has yet to identify a method under which Missouri law would permit the use of community treatment for a person who is "likely to engage" in other equivalent kinds of "violence if not confined in a secure facility." Unless and until he does so, he has no equal protection argument to make.

III.

The trial court did not err in denying Edwards' motion for immediate release when his first trial ended with a hung jury because § 632.495 requires that, upon a mistrial, the person must be held in a secure facility until another trial is conducted.

For his third point on appeal, Edwards claims that the trial court erred in denying his motion for immediate release when his first trial ended with a hung jury (App.Br. 49). Edwards argues that § 632.495 requires a unanimous verdict for commitment, and that if the jury cannot agree on whether or not the person is a sexually violent predator, the judge does not declare a mistrial and set a date for retrial, rather, Edwards contends that the person must immediately be released (App.Br. 52).[7]

1. Facts

Edwards' case was set for trial on August 28, 2001 (L.F. 4). On August 31, 2000, the trial court declared a mistrial because the "jury was unable to reach a unanimous verdict" (L.F. 6, 122). The trial court then ordered that Edwards be held at the sexually violent predator unit of the Farmington Correctional Center until retrial (L.F. 6, 122). On October 2-5, 2000, Edwards was retried, and the jury unanimously found him to be a sexually violent predator (L.F. 7, Tr. 148, 465, 467).

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[7] Under the 2001 amendments to the statute, "Any determination as to whether a person is a sexually violent predator may be appealed." Thus, under the amendment, the state may now appeal even if the jury determines that the person is not a sexually violent predator.

2. Principles of statutory interpretation

The precepts for interpreting statutory language are well-settled. "As has been noted repeatedly, this Court has a duty to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning. This Court cannot look to rules of construction if the statute contains no ambiguity." *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 154 (Mo.banc 1998). "Construction of statutes should avoid unreasonable or absurd results. Furthermore, the legislature is not presumed to have intended a meaningless act." *Murray v. Mo. Highway & Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo.banc 2001) (citation omitted).

3. The plain meaning of § 632.495 not only allows, but requires a retrial after a mistrial, including a mistrial for failure of the jury to reach a unanimous verdict

Section 632.495 provides, in pertinent part, that if a fact-finder determines beyond a reasonable doubt that the person is a sexually violent predator, the person is committed. If a fact-finder determines that there is a reasonable doubt as to whether the person is a sexually violent predator, the person must be released. If there is a mistrial, the person is re-tried.

The statute takes care to use specific language to add procedural safeguards usually reserved for criminal trials. Although the commitment proceeding is civil, the statute spells out that the fact-finder's determination must be made beyond a reasonable doubt. Then the statute spells out that, where the fact-finder is a jury, its verdict must be unanimous– which specifically distinguishes this proceeding from other civil cases, where "three-fourths or more jurors may return a lawful verdict." Section 494.490. The statute then details all the

procedures for committing a person after the fact-finder has determined the person to be a sexually violent predator.

Next, the statute spells out the result when the fact-finder concludes that the state has not met its burden of proof. The statute says that, where "the court or jury is not satisfied beyond a reasonable doubt that the person is a sexually violent predator," the court must release the person. Here, the term "jury" is a collective noun, referring to all twelve jurors as a group. Thus, given its plain meaning, this sentence provides that if all twelve jurors conclude that the state did not meet its burden of proof, the court must release the person.

Finally, the statute spells out what happens in the event of a mistrial. The statute says that, upon a mistrial, the person is to be held in a secure facility until another trial is conducted. The word "mistrial" refers to "[a]n erroneous, invalid, or nugatory trial. . . . The judge may declare a mistrial because of some extraordinary event (e.g., death of a juror, or attorney), for prejudicial error that cannot be corrected at trial, **or because of a deadlocked jury**." *Black's Law Dictionary*, Sixth Edition, 1990, pg. 1002 (emphasis added). Thus, under its plain meaning, the statute requires that the person be held until retrial if the jury cannot reach a verdict.

Therefore, under the plain meaning of the statute, if the jurors all agree that the state has met its burden of proof, the person is committed. If the jurors all agree that the state has not met its burden of proof, the person is released. If the jurors cannot agree, the person is held in a secure facility until retrial.

Here, the jurors in Edwards' first trial could not agree on a verdict (L.F. 6, 122). Therefore, the trial court, following the explicit dictates of § 632.495, ordered Edwards held in a secure facility until he was retried. Nothing in this procedure violated § 632.495. Therefore, Edwards' claim that his retrial violated the statute is without merit, and must fail.

Edwards argues that, under the statute, if the jury cannot agree on a verdict, the person must be released (App.Br. 51). Edwards argues that the sentence in the statute that explains what to do upon a mistrial must refer to all mistrials except those occasioned by a hung jury (App.Br. 51). Edwards argues that his novel interpretation of the word "mistrial" is required in order to "harmonize" this sentence with the other parts of the statute (App.Br. 51). Thus, Edwards argues that this Court should interpret the statute to give an unreasonable result: to hold that a hung jury is equivalent to a verdict, a rule unparalleled in all other civil and criminal laws. However, Edwards cannot argue for the "plain meaning" to create an unreasonable result, while in the next breath arguing for a special construction of a clear statutory term in order to make that unreasonable result possible even though it conflicts with the clear terms of the statute.

Rather than following Edwards' convoluted interpretation of § 632.495, this Court must follow the plain and ordinary meaning of all the words in the statute, and find that the trial court did not err in overruling Edwards' motion to dismiss.

IV.

The trial court did not err, plainly or otherwise, in denying Edwards' motion to dismiss alleging lack of standing because the recommendation of the multidisciplinary committee (MDT) is irrelevant to whether the Attorney General has standing to proceed in that § 632.486 allows the Attorney General to file a petition seeking commitment upon a majority vote of the prosecutor's review committee.

For his sixth point on appeal, Edwards claims (1) that the trial court erred in denying his motion to dismiss which alleged that the Attorney General lost standing when the MDT's assessment was negative, (2) that the petition was required to include an allegation that the MDT assessed Edwards to be a sexually violent offender, and (3) that the petition failed to state a cause of action (App.Br. 53-55). All his claims fail if the Attorney General has the power to file a petition seeking to commit a person where the MDT assesses that the person is not a sexually violent predator.

1. Facts

On November 24, 1999, the Attorney General filed a petition seeking commitment of Edwards under § 623.480, et seq. (L.F. 8-18). The petition alleged that the Department of Corrections had certified that Edwards might meet the criteria of a sexually violent offender, that Edwards was confined but was due to be released within 180 days, that the MDT had completed an assessment, that the prosecutor's review committee had determined by majority vote that Edwards met the definition of a sexually violent predator, and that the court had jurisdiction of the petition pursuant to § 632.486 (L.F. 8-9).

Edwards filed a motion to dismiss the petition, stating that the members of the MDT had assessed him as not appearing to meet the definition of a sexually violent predator, that this assessment operated to rescind the Department of Corrections' certification that Edwards might be a sexually violent predator, and that the Attorney General then lost standing to proceed (L.F. 79-80). Edwards attached a copy of the MDT's report, which report showed that all participating members of the MDT had concluded that Edwards did not appear to meet the definition of a sexually violent predator (L.F. 82).[8] The trial court overruled the motion to dismiss (L.F. 6, 80).

2. Principles of statutory construction

The precepts for interpreting statutory language are well-settled. "As has been noted repeatedly, this Court has a duty to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider words used in their plain and ordinary meaning. This Court cannot look to rules of construction if the statute contains no ambiguity." *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 154 (Mo.banc 1998). "Construction of statutes should avoid unreasonable or absurd results. Furthermore, the legislature is not presumed to have intended a meaningless act." *Murray v. Mo. Highway & Transp. Comm'n*, 37 S.W.3d 228, 233 (Mo.banc 2001) (citation omitted).

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[8] Edwards' two victims were strangers to him, but records listed them as being his relatives (Tr. 340-41). Before § 632.480(3) was amended in 2001, it seemed to preclude family members from being considered victims under the statute.

3. Under the plain meaning of § 632.483 and § 632.486, the MDT's assessment does not restrict the Attorney General's standing

Section 632.483 and § 632.486 do create a committee whose decisions limit the Attorney General's authority to initiate a sexually violent predator proceeding. But that committee is the prosecutor's review committee, not the MDT. Under the statute, the MDT's assessment must be made available to the Attorney General and the prosecutor's review committee, but its assessment is irrelevant to the power of these entities to act.

Section 632.483.1 requires an agency with jurisdiction (in this case, the Department of Corrections) to notify the Attorney General and MDT when it appears that a person may meet the criteria of a sexually violent predator.

Section 632.483.4 requires the establishment of the MDT, consisting of members of the departments of mental health and corrections and other state agencies, who review a person's records and assess whether the person meets the definition of a sexually violent predator. Nothing in the statute requires that the team members have special legal or psychiatric qualifications or that they conduct investigation beyond the records made available to them. The statute requires the MDT to "notify the attorney general of its assessment." Section 632.483.4.

Section 632.483.5 requires the establishment of a prosecutor's review committee, whose members review the records of each person referred to the Attorney General under § 632.483.1, and determine whether the person meets the definition of a sexually violent

predator. The MDT's assessment must be made available to the prosecutor's review committee. § 632.483.5

Section 632.486 authorizes the Attorney General to proceed without reference to the MDT's assessment:

> When it appears that the person presently confined may be a sexually violent predator[9] and the prosecutor's review committee appointed as provided in subsection 5 of section 632.483 has determined by a majority vote, that the person meets the definition of a sexually violent predator, the attorney general may file a petition, in the probate division of the circuit court in which the person was convicted . . within forty-five days of the date the attorney general received the written notice by the agency with jurisdiction as provided in subsection 1 of section 632.483, alleging that the person is a sexually violent predator and stating sufficient facts to support such allegation.

Under this statute, if there is an initial determination and notice by the agency with jurisdiction, and if the prosecutor's review committee determines by majority vote that the person may be a sexually violent offender, then the Attorney General has power to file a petition with the circuit court alleging that the person is a sexually violent offender.

Under these statutes, the MDT reviews the person's records, makes an assessment, notifies the attorney general of its assessment, and makes its assessment available to the attorney general and the prosecutor's review committee. Its entire function is to review the

[9] Under § 632.483.1, this determination is made by "the agency with jurisdiction."

person's records and make an advisory assessment. The MDT has no power to bind the Attorney General, it only has power to advise the Attorney General. No matter what assessment the MDT makes, it has no effect on whether the Attorney General has standing to proceed. Therefore, Edwards' claims that the MDT's negative assessment deprived the Attorney General of standing, that the MDT was required to make a positive finding in order for the proceeding to go forth, and that the petition had to plead a positive finding in order to state a cause of action, are all without merit, and must fail.

Edwards argues that, "[i]f the MDT's assessment could be ignored, then there would be no reason for the assessment at all and the provision would have no meaning" (App.Br. 57). However, the provision requiring the MDT does have a meaning: the MDT advises the prosecutor's review committee and attorney general. But it does not control their actions. The reason for the assessment is not jurisdictional, it is to provide information to the authorities responsible for making the decision whether or not to prosecute the case. Therefore, Edwards' argument is without merit, and must fail.

V.

The trial court did not err in denying Edwards' motion for a directed verdict because the evidence was sufficient to establish that Edwards has a mental abnormality making it more likely than not that he will rape children if released in that the evidence showed that Edwards had mental disorders of pedophilia and anti-social personality disorder and that these conditions cause him to rape children under circumstances when he has used intoxicants and children are available to him.

For his fifth point on appeal, Edwards claims that the evidence was insufficient to show that his mental abnormality makes it more likely than not that he will rape children if released (App.Br. 58). Edwards appears to argue that a mental abnormality must be taken in a vacuum, without regard to his individual characteristics (App.Br. 61-62). However, the statute does not support his claim.

1. Facts

At trial, Dr. Logan's testimony established that Edwards had a mental abnormality of pedophilia, and his history showed that he acted on that attraction when children were available and he had taken intoxicants (Tr. 266, 269-71). Dr. Logan said that it was the pedophilia that was the root cause of Edwards' sexual assaults on children, not the intoxication (Tr. 269-71). Dr. Logan said that Edwards' mental abnormality of being pedophilia, coupled with his history, including sexually assaulting two children within 5 ½ months, denying the acts, failing to complete sex offender counseling, and drug addiction, created a high risk, greater than not, that Edwards would again rape children if released without further treatment (Tr. 268-73, 294).

Edwards' own expert, Dr. Scott, testified that Edwards had a mental abnormality, anti-social personality disorder (Tr. 315). Dr. Scott said that on one test of likelihood of reoffending, Edwards had all sixteen risk factors, giving him a 70-78% chance of being convicted of another sexual offense within four-to-six years of release (Tr. 346, 409, 414-15).

2. Standard of review and statutory requirements

The denial of a motion for a directed verdict presents the issue of whether the plaintiff made a submissible case. *Skinner v. Thomas*, 982 S.W.2d 685, 698 (Mo.App. E.D. 1998). "A case is not to be submitted to the jury unless each and every fact essential to liability is predicated upon legal and substantial evidence." *Id.* In determining whether a plaintiff has made a submissible case, the appellate court views "the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff." *Id.* This Court "will not overturn a jury verdict unless there is a complete absence of probative facts to support it." *Id.*

Under § 632.480(5), in order to prove that a person is a sexually violent predator, the state must prove that the person, "suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secure facility . . . ." Importantly to this point, the statute does **not** say that the state must prove that the person, "suffers from a mental abnormality which**, taken in isolation,** makes the person more likely than not to engage in predatory acts of sexual violence . . . ." Rather, the mental abnormality must affect the individual person in such a way that it causes the person to be more likely than not to engage in acts of predatory violence. Under the statute, if two people had the

same mental abnormality, the one who successfully controls it could not be committed, but the other who does not could be committed.

3. The evidence was sufficient to make a submissible case

As shown above, the evidence and inferences at trial, taken in the light most favorable to the plaintiff, the State of Missouri, showed that Edwards had two mental disorders, pedophilia[10] and anti-social personality disorder (Tr. 269-71, 315). Both experts gave testimony showing that, because of these disorders, there is a high risk, much greater than not, that Edwards will again rape children if released without having first been treated (Tr. 294, 346, 409, 414-15). Under these facts, the evidence was sufficient to establish that Edwards suffers from a mental abnormality that makes it more likely than not that he will engage in predatory acts of sexual violence if not confined in a secure facility. Therefore, Edwards' point has no merit.

Edwards argues that, because Dr. Logan testified that Edwards only acts on the addiction when he is intoxicated, his pedophilia alone does not make it more likely than not that he will rape children (App.Br. 61-62). However, in determining whether a person is a sexually violent predator, the statute requires the state to prove how the mental abnormality affects the

[10] Edwards suggests that Dr. Logan never specified what the mental abnormality was (App.Br. 61). At trial, Dr. Logan testified that Edwards' mental abnormality was being attracted to prepubertal children, which he would either classify as pedophelia or paraphelia not otherwise specified (Tr. 269-70).

individual person. It is impermissible, under the statute, to consider the mental abnormality alone; the mental abnormally must affect the individual person in such a way that the person is more likely than not to engage in predatory acts of sexual violence. Section 632.480(5).

Thus, if the evidence had shown that Edwards had successfully controlled his pedophilia, the fact alone that he had the mental abnormality of pedophilia would not be sufficient to involuntarily commit him. However, the evidence showed that Edwards acted on his mental abnormality, and would more likely than not continue to act on it. Dr. Logan testified that Edwards' pedophilia caused him to rape children, and his intoxication was only a facilitator: his drug addiction was just one of several factors which showed that it was more likely than not that he would reoffend (Tr. 268-74).

Edwards basically argues that, if he did not have a life-long, constant, unsuccessfully treated drug addiction, he would probably not act on his mental abnormality, and therefore, the mental abnormality alone does not make it more likely than not that he will rape children. But Dr. Logan also testified that Edwards only rapes children when they are available. It makes just as much sense for Edwards to argue that he does not rape children when there are no children available, and therefore it is not his pedophilia alone which makes him more likely than not to rape children, but only his pedophilia combined with the circumstance of children being present. These arguments fail precisely because the statute requires a causation element: the state must show that the mental abnormality causes the individual to act, therefore the person cannot argue that what makes him, as an individual, act on the mental abnormality is irrelevant.

Edwards' individual characteristics are neither irrelevant nor ignorable, they are part of the showing required under the statute.

Edwards is a drug addict, and he will certainly have access to children if released. He would not rape children were it not for his mental abnormality. Under his circumstances, his mental abnormality makes it more likely than not that he will rape other children. Thus, his point must fail.

VI.

The trial court did not abuse its discretion in allowing Officer Paul Saulter to testify to statements made by Letha Jones because the statements were admissible under the excited utterance exception to the hearsay rule in that Ms. Jones made the statements while still under the stress of seeing Edwards attempting to rape her daughter.

For his sixth point on appeal, Edwards claims that the trial court abused its discretion in allowing Officer Paul Saulter to testify to statements Letha Jones made to him when he responded to the scene of the crime (App.Br. 62). Edwards claims that the statements were used for their truth, and did not fit the excited utterance exception to the hearsay rule (App.Br. 64-65).

1. Facts

At trial, Ofr. Saulter testified that at 5:07 a.m. he was dispatched to investigate a child molestation case (Tr. 158-59). Letha Jones met him outside the house (Tr. 156-60). She was "highly upset" and "angry," and told Ofr. Saulter, "if the police don't take care of this, she would" (Tr. 161). Ms. Jones told him that at approximately 4:30 a.m. she awoke to hear her baby crying, went in the room, and saw Edwards standing over her one-year-old daughter, his pants down, rubbing his penis on her daughter's vagina (Tr. 160). She called the police (Tr. 161).

2. Excited utterance exception to the hearsay rule

"[U]tterances made under stressful circumstances and relating to the event producing the stress have sufficient reliability to require that they be considered by the trier of fact, rather than being excluded by the trial judge." *State v. Williams*, 673 S.W.2d 32, 34 (Mo. 1984). When analyzing a statement under the "excited utterance" exception to the hearsay rule, "temporal proximity between the event and the statement need not be simultaneous so long as the statement is provoked by the excitement of the event." *State v. White*, 621 S.W.2d 287, 295 (Mo. 1981). "[T]he essential test for admissibility of a spontaneous statement or excited utterance is neither the time nor the place of its utterance, but whether it is made under such circumstances as to indicate that it is trustworthy." *State v. Boyd*, 669 S.W.2d 232, 234 (Mo.App. 1984).

Edwards cites to *State v. Post*, 901 S.W.2d 231 (Mo.App.E.D. 1995)[11], as containing the standard for admission of hearsay under the excited utterance exception. In *Post*, the court articulates the test as whether 1) a startling event occurred, 2) a statement is made while the declarant is under the stress of the excitement caused by the event, and 3) the statement refers or relates to the event. *Id.* at 234. But Edwards tries to add two factors to the test: the time between the event and the statement, and whether a question was asked (App.Br. 65). As shown above, the first factor was rejected in *White*, 621 S.W.2d at 295, and the second factor was rejected in *Boyd*, 669 S.W.2d at 234.

[11] Edwards mistakingly cites *Post* as located at 901 S.W.2d 221.

3. Ms. Jones' statements were admissible under the excited utterance exception to the hearsay rule

In the case at bar, Ms. Jones' statements regarding Edwards' attempted rape of her daughter were admissible. Certainly, walking in on Edwards trying to rape her daughter was a startling and stressful event. Ms. Jones was still under the stress and excitement caused by the event; Ofr. Saulter testified that she was "highly upset" and "angry" at the time she spoke to him, and she made threats towards Edwards (Tr. 160-61). Finally, the statement was related to the attempted rape in that it was Ms. Jones' description of seeing that crime occur. Therefore, Ms. Jones' statements qualify for admission under the excited utterance exception to the hearsay rule, and Edwards' point has no merit.[12]

Even if this Court were to consider the time between the event and the statement and whether the statement was made in response to questioning, Ms. Jones' statement would still meet the excited utterance exception. The statement was made approximately thirty minutes after the rape (Tr. 159-60). *Compare State v. White*, 621 S.W.2d at 295 (statement made one hour later); *State v. Wilson*, 719 S.W.2d 28, 30, 33 (Mo.App.W.D. 1986) (statement made more than two hours later). Edwards' brief asserts that no question was posed to Ms. Jones

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[12] Edwards makes a bare assertion that the admission of the statement violated his Fifth and Sixth Amendment rights (App.Br. 65). This claim fails as a matter of law because these amendments do not apply in a civil sexually violent predator proceeding. *Allen v. Illinois*, 478 U.S. 364, 106 S. Ct. 2988, 2994 (1986).

(App.Br. 65), but if this is relevant at all, it only strengthens an inference that Ms. Jones' statement was an outburst made as a result of stress from seeing the rape. Therefore, Edwards' point must fail.

VII.

The trial court did not abuse its discretion in quashing Edwards' subpoenas of the members of the MDT and in refusing to allow their testimony that they determined Edwards was not a sexually violent predator because their testimony was not admissible in that it could not assist the jury. In any event, Edwards was not prejudiced.

For his seventh point on appeal, Edwards claims that the trial court abused its discretion in quashing his subpoenas of members of the MDT and refusing to allow them to be called to testify to their findings (App.Br. 66). Edwards claims that if § 632.483.5 prohibits the use of their testimony for this purpose, the statute is unconstitutional (App.Br. 66).

1. Facts

Edwards issued subpoenas on all members of the MDT, and the state moved to quash them (L.F. 116-118). In response, Edwards filed a motion to find § 632.483.5 unconstitutional and to permit testimony of the members of the MDT regarding their findings (L.F. 119-20). The court sustained the state's motion and denied Edwards' motion (L.F. 6).

2. Standard of Review

"A trial court's ruling on evidence ordinarily will not be overturned absent an abuse of discretion. Abuse of judicial discretion occurs when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration. 'Said another way, abuse of discretion means an untenable judicial act that defies reason and works an injustice.' If reasonable people can differ about the propriety of the action taken by the trial court, then it

cannot be said that the trial court abused its discretion." *Bowman v. McDonald's Corp.*, 916 S.W.2d 270, 276 (Mo.App.W.D. 1995). If the trial court's ruling is correct as a matter of law under any theory, it will be affirmed even though it may have been entered for the wrong reason. *Thomas v. Thomas*, 21 S.W.3d 168, 175 (Mo.App.S.D. 2000).

3. Section 632.483 is irrelevant to a determination of whether the testimony of the MDT members is admissible, which fact destroys the basis for Edwards' assertion that the statute is unconstitutional

Section 632.483.5 provides that, "The determination of the prosecutors' review committee or any member pursuant to this section or section 632.484[13] shall not be admissible evidence in any proceeding to prove whether or not the person is a sexually violent predator." As discussed in point V, *supra*, § 632.483 makes no statutory regulation of the use of testimony from members of the MDT. Because § 632.483 does not itself prohibit the admission of testimony from the members of the MDT, that statute could not affect whether the members of the MDT could be subpoenaed or called to testify at trial. Therefore, the statute is irrelevant to a determination of the propriety of the trial court's rulings on this issue. Accordingly, nothing in Edwards' point supports a finding that the statute unconstitutionally precluded him from adducing evidence at trial.

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[13] Section 632.484.4 also requires the prosecutor's review committee to make determinations as to whether the person is a sexually violent predator.

4. The trial court did not abuse its discretion in quashing the subpoenas and refusing to allow the testimony of the members of the MDT

Edwards admits, in his Point Relied On, that he wanted to present testimony from the members of the MDT for the purpose of "presenting favorable testimony that he is not a SVP." In his argument, he claims he was entitled to "demonstrate that he was not a SVP through the testimony of five professionals that the state entrusted to make that decision in the first instance," that their testimony would have "directly impacted an ultimate issue in the case," and that he was "prejudiced by the trial court's rulings because the jury was not allowed to hear that several professionals whose job entailed an assessment and determination that Edwards is or is not a SVP concluded he was not." (App.Br. 70, 73). In his motion, he asked that the MDT members be allowed to testify as to their conclusions in this case (L.F. 119).

Under § 632.483, the MDT's function is to "review available records," to "assess whether or not the person meets the definition of a sexually violent predator," to "notify the attorney general of its assessment," and to make its assessment "available to the attorney general and the prosecutor's review committee." The members of the MDT only made one conclusion under the statute: whether to check-off a "yes" or "no" box under the assessment of whether Edwards appeared to be a sexually violent predator (L.F. 82). The MDT does not perform a psychological evaluation of the person; under the statute, the evaluation is ordered only after the circuit court finds probable cause to believe the person is a sexually violent predator. § 632.489.4.

Thus, Edwards' motion and argument on appeal claim that he should have been permitted to call the members of the MDT solely to testify that they concluded Edwards was not a sexually violent predator. Edwards did not ask to hire the MDT members to examine him and give an expert opinion on his mental state, and does not now suggest that he could drag into court, involuntarily, an expert who was never hired nor purported to do the kind of evaluation required to support Edwards' (or even the State's) position at trial. Rather, he asked to be able to put the five members on the stand and have each one say in turn, "Wen I looked at Edwards records, my assessment under the statute was that Edwards did not appear to be a sexually violent predator." This was impermissible.

Experts witnesses may be called to give opinion testimony if the witness has specialized knowledge which will help the jury to understand the evidence or determine a fact in issue. Section 490.065.1. However, "expert witnesses' opinion testimony 'should never be admitted unless it is clear that the jurors themselves are not capable, for want of experience or knowledge of the subject, to draw correct conclusions from the facts proved.'" *Guzman v. Hansen*, 988 S.W.2d 550, 554-55 (Mo.App.E.D. 1999) (trial court erred in admitting opinion testimony of professional truck driver because lay jurors were able determine whether defendant drove his truck safely), *see State v. Clements*, 789 S.W.2d 101, 110 (Mo.App.S.D. 1990) (expert was not allowed to give opinion on paramount issue of whether defendant deliberated; determination of issue was under capability of lay jurors after being instructed on the law).

Here, once they were instructed on the law, the determination of whether Edwards was a sexually violent predator was well-within their abilities as lay jurors. They needed facts to determine whether Edwards had a prior sexual assault conviction, they needed expert testimony on whether he had a mental abnormality, and they probably needed testimony on whether it was more likely than not that he would commit predatory sexually violent offenses if released. But once they had this information and the court's instructions, they were perfectly capable of deciding for themselves whether Edwards was a sexually violent predator. They certainly did not need some expert to come in and say, "I looked at some records, and thought he was a sexually violent offender." Such testimony could not help the jury reach its conclusion, and ran the risk that the jury would abdicate its function and defer to the opinion of an expert who had merely reviewed records available before the proceeding began and who did not have the benefit of listening to the testimony of fact and expert witnesses who had actually examined Edwards. Therefore, the trial court was well-within its discretion in deciding to exclude this testimony. Accordingly, there is no merit to Edwards' claim that the trial court abused its discretion in quashing his subpoenas of the MDT members and in refusing to allow their testimony.

5. Edwards has not shown prejudice.

In any event, Edwards was not prejudiced. "A trial court does not usually commit reversible error by mere exclusion of expert testimony, even if the offered testimony is

relevant and admissible." *Bowman v. McDonald's Corp.*, 916 S.W.2d at 282. Edwards' own expert, Dr. Scott, testified that he not only reviewed Edwards' records, but gave him two risk-assessment tests, and interviewed him, and determined that Edwards was not a sexually violent predator (Tr. 312-14, 331-32). Thus, testimony that MDT members assessed Edwards as not appearing to meet the sexually violent predator definition would have been cumulative to Dr. Scott's testimony. Accordingly, any error in excluding their testimony was not prejudicial. *Tyrrell v. Francka*, 951 S.W.2d 685, 694 (Mo.App.S.D. 1997) (even if the report was erroneously excluded, there was no prejudice where it was similar to other evidence admitted at trial). Therefore, Edwards' point has no merit, and must fail.

VIII.

The trial court did not plainly err in allowing the state to call Edwards to the stand because this did not violate his Fifth Amendment right to be free from self-incrimination in that this right does not apply to civil proceedings such as this trial. In any event, Edwards has not shown manifest injustice.

For his eighth point on appeal, Edwards claims that the trial court plainly erred in allowing the state to call him as a witness (App.Br. 74).

1. Facts

At trial, the state called Edwards to the stand, without objection (Tr. 170). On direct examination he testified that he did not remember raping the children, that he had a drug problem, and that he had not committed other sexual offenses (Tr. 170-74). On cross-examination, Edwards denied that he tried to rape the baby, denied being attracted to children, claimed to have relationships with adult women, testified that he would not hurt another child, and said that he would not take alcohol or drugs if he were released (Tr. 180-87).

2. Standard of review

Edwards concedes that his point is not preserved for review, and requests plain error review (App.Br. 74). "Plain error review is rarely applied in civil cases, and may not be invoked to cure the mere failure to make proper and timely objections." *Guess v. Escobar*, 26 S.W.2d 235, 241 (Mo.App.W.D. 2000) (citation omitted). "Plain errors affecting substantial rights may be considered when the Court finds that manifest injustice or miscarriage of justice has resulted therefrom." *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 339 (Mo.banc 1998); Supreme

Court Rule 84.13(c). Thus, Edwards must show more than mere prejudice; he must carry the greater burden of proving manifest injustice in order to prevail on this claim.

3. The Fifth Amendment right against self-incrimination does not apply to a civil commitment proceeding

In *Allen v. Illinois*, 478 U.S. 364, 374, 106 S.Ct. 2988, 2995, 92 L.Ed.2d 296 (1986), the United States Supreme Court held that the Fifth Amendment right to remain silent did not apply in a proceeding for civil commitment under Illinois' Sexually Dangerous Persons Act, because the right only applies in criminal proceedings. The Court overruled cases such as *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), which implied otherwise. *Allen*, 478 U.S. at 372, 106 S.Ct. at 2994 (such cases are "plainly not good law.").

Courts have specifically found, under *Allen*, that statements obtained during sexual offender treatment and assessment programs are admissible during a sexually violent predator's civil commitment proceedings. *Bankes v. Simmons*, 963 P.2d 412 (Kan. 1998); *Russell v. Eaves*, 722 F.Supp. 558, 560 (E.D. Mo. 1989).

The Fifth Amendment may generally be invoked in civil proceedings to protect a party from giving testimony that might incriminate him. *See, e.g., State ex rel. Pulliam v. Swink*, 514 S.W.2d 559, 560-61 (Mo. banc 1974) (privilege against self-incrimination may be raised outside criminal proceedings). To "incriminate" means, "To charge with crime; to expose to an accusation or charge of crime; to involve oneself or another in a criminal prosecution or the danger thereof; as, in the rule that a witness is not bound to give testimony which would tend to incriminate him." *Black's Law Dictionary*, pg. 767, Sixth Edition, 1990. In the case

at bar, however, Edwards was not being exposed to the risk of incrimination; he was being civilly tried to determine if he should be committed. In *Kansas v. Hendricks*, 521 U.S. 346, 363, 117 S.Ct. 2072, 2082, 138 L.Ed.2d 501 (1997), the United States Supreme Court found that Kansas' Sexually Violent Predator law was a civil proceeding. Similarly, Missouri's law, which was patterned after Kansas' law, is a civil proceeding. Therefore, even if Edwards' testimony made it more likely that he would be committed, his testimony did not cause him to incriminate himself. Edwards cites no case where a court has found that a person has the right to take the Fifth Amendment in a civil commitment proceeding. Accordingly, Edwards' point has no merit.

Edwards argues that under *State ex rel. Simanek v. Berry*, 597 S.W.2d 718 (1980), he could not be called to give testimony in his case. However, *Simanek* relied on *Gault*, which was expressly overruled in *Allen*. Additionally, *Simanek* is distinguishable on its facts, because it was based on a statute which expressly allowed a person to invoke the right to remain silent in that proceeding. *Simanek*, 597 S.W.2d at 720. There is no such statutory right in §§ 623.480-513. Therefore, Edwards' reliance on *Simanek* is misplaced.

4. In any event, Edwards has not shown plain error resulting in manifest injustice

Even assuming, *arguendo*, that the trial court erred in allowing the state to call Edwards to testify, given the case law above, such an error was not "plain" on its face. *State v. Vaught*, 34 S.W.3d 293, 295 (Mo.App.W.D. 2000). Moreover, Edwards could not have suffered a manifest injustice from the error. Edwards claims that he was "prejudiced" by being required

to take the stand because the state was able to use his testimony to argue that he had a selective memory regarding his past offenses (App.Br. 76). However, Edwards' previous statements to various professionals over the years established that he would, on occasion, claim to have no memory of the sexual assaults, but on other occasions, he would provide details about the crimes (Tr. 166-67, 199-200, 262-63). Therefore, his testimony was merely cumulative to his other, admissible statements, and could not have caused manifest injustice. *Emery v. Wal-Mart Stores*, 976 S.W.2d 439, 447-48 (Mo.banc 1998) (no manifest injustice where trial testimony was merely cumulative to other evidence).

Additionally, by allowing the state to call him as a witness, Edwards' attorney was able to ask him leading questions on cross-examination, which questions elicited his promise to never again use drugs, his assertion that he was not attracted to children and would never harm another child, and his assertion that he had not attempted to rape the one-year-old. Edwards' favorable testimony weighs against any finding of manifest injustice. Therefore, Edwards' point must fail.

IX.

The trial court did not plainly err in not dismissing Edwards' case, *sua sponte*, after the St. Louis City circuit attorney sent an assistant circuit attorney to serve on the prosecutor's review committee in her place because this action complied with § 632.483.5 in that prosecutors may act through their assistants. In any event, the statutory language is not mandatory, and Edwards did not suffer manifest injustice.

For his ninth point on appeal, Edwards claims that the trial court plainly erred in failing to *sua sponte* dismiss his case when the St. Louis City circuit attorney, Dee Joyce Hayes, sent an assistant circuit attorney to serve on the five-member prosecutor's review committee (App.Br. 76-77). Edwards argues that the statute only allows "the" prosecuting attorney to serve on the committee, and an assistant prosecutor is not good enough (App.Br. 79).

1. Facts

On November 23, 1999, the prosecutor's review committee met by conference call (L.F. 18). One of the five members, Joseph Warzycki, served as the "St. Louis City Prosecuting Attorney Designee" (L.F. 18). At the meeting, each of the members voted on whether Edwards met the definition of a sexually violent predator, and the majority vote was that Edwards did meet this definition (L.F. 18). Assistant Circuit Attorney Warzycki voted that he did not meet the definition (L.F. 18).

2. Standard of review

Edwards did not raise this claim at trial or in his motion for a new trial. He impliedly concedes that his point is not preserved for review, and requests plain error review (App.Br. 77). "Plain error review is rarely applied in civil cases, and may not be invoked to cure the mere failure to make proper and timely objections." *Guess v. Escobar*, 26 S.W.2d 235, 241 (Mo.App.W.D. 2000) (citation omitted). "Plain errors affecting substantial rights may be considered when the Court finds that manifest injustice or miscarriage of justice has resulted therefrom." *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 339 (Mo.banc 1998); Supreme Court Rule 84.13(c).

3. Under § 632.483.5 and § 56.550, the prosecuting attorney may assign an assistant to serve on the prosecutor's review committee

Section 56.430 provides that St. Louis City has an elected "circuit attorney" who has the same qualifications and duties as prosecuting attorneys. Section 56.540 empowers the circuit attorney to appoint assistant circuit attorneys to assist him or her in the proper administration of the office. Section 56.550 gives assistant circuit attorneys power "to assist the circuit attorney generally in the conduct of his office," under the circuit attorney's direction and control.

The Missouri Rules of Criminal Procedure have long equated "prosecutor" with "assistant prosecutor," "for the reason, no doubt, that the office commands from both the same qualifications and the same duty. Sections 56.151 [Laws of 1973], 56.180, 56.200, 56.240, **56.550**, RSMo 1969." *State v. Tierney*, 584 S.W.2d 618, 620 (Mo.App. W.D. 1979) (emphasis added) (holding that, even though "the" prosecutor did not sign the amended

information, it did not deprive the court of jurisdiction, because when the assistant prosecutor signed the information, it was the same as if the prosecutor had signed it.).

The Rules of Criminal Procedure did not apply to the instant proceeding, because it was civil and brought in probate. However, the criminal rules help show that, in using the term "the prosecuting attorney" in § 632.483.5, the legislature was simply following the long-standing convention, recognized in *Tierney*, of equating prosecutors with their assistants. In fact, the subsection even refers specifically to Chapter 56, which chapter, as shown above, includes sections empowering circuit attorneys to delegate assistants to help perform the duties of the circuit attorney. Nothing in § 632.483.5 prohibits the elected circuit attorney from delegating prosecutors' review committee function to an assistant circuit attorney. In view of § 56.550, which specifically allows the circuit attorney to direct assistant circuit attorneys to assist her in performing the duties of her office, the long-standing convention of referring to the prosecuting attorney and meaning the prosecutor and assistant prosecutors, and the lack of any specific language prohibiting the circuit attorney from directing an assistant to serve on the prosecutor's review committee, § 632.483.5 does not prohibit the circuit attorney from

appointing an assistant to serve on the prosecutor's review committee in her stead.[14] Therefore, Edwards' point must fail.

4. In any event, the subsection is directory, not mandatory

Even assuming that § 632.483.5 called for the personal participation of the circuit attorney, the statute is not mandatory in that respect. "[W]hen a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed. However, if it merely requires certain things to be done and nowhere prescribes the results that follow, such a statute is merely directory." *State v. Hoover,* 719 S.W.2d 812, 816 (Mo.App. W.D. 1986) (*quoting Garzee v. Sauro,* 639 S.W.2d 830, 832 (Mo. banc 1982)). Thus, courts have readily concluded that various statutes containing the word "shall," but lacking a penalty or other provision for failure to comply with its terms, are directory rather than mandatory. *See, e.g., Tooley v. State of Missouri,* 875 S.W.2d 110 (Mo. banc 1994) (insanity acquittee failed to receive hearing within statutorily-prescribed 60-day window; statute nevertheless directory);

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[14] Under Edward's logic, he was not entitled to a representative from St. Louis City at all, because nothing in that subsection authorized the "circuit" attorney to even attend the meeting, as the statute uses the term "prosecuting" attorney, not "circuit" attorney, the statute refers to the prosecutor from the "county" where the person was convicted, not the "city," and the subsection does not explicitly equate the terms. This sort of hair-splitting leading to unreasonable results is precisely why the statute should be read with consideration of the common use of the term "prosecuting attorney" as including assistant prosecutors.

Frager v. Director of Revenue, 7 S.W.3d 555 (Mo.App. E.D. 1999) (Director failed to issue final administrative decision within 90-day window; director not deprived of authority to enter decision after the 90-day period had passed); *State v. Conz,* 756 S.W.2d 543 (Mo.App. W.D. 1988) ("persistent offender" status not proved as specified by statute; conviction stands). *Compare Greenwich Condominium Association v. Clayton Investment Corp.*, 918 S.W.2d 410 (Mo.App. E.D. 1996) (statute specifically provided that tax purchaser "shall apply" for occupancy permit, and that failure to apply within ten days "shall result" in the sale being set aside; because statute provided result for failure to comply with its terms, it was mandatory).

Because the prosecutors' review committee statute at issue here provides no penalty or result that would flow from an irregularity in the composition of the committee, the statute is directory. Nothing about the construction of this statute in this civil commitment case distinguishes it, for purposes of this cannon of statutory construction, from the insanity acquittee case, *Tooley, supra*; the administrative review case, *Frager, supra*; or the criminal case, *Conz, supra.* Therefore, even if the subsection required the circuit attorney to personally attend the prosecutor's review committee, sending an assistant did not render the committee's conclusions void, and the trial court was not required to dismiss the case.

5. Edwards has not shown plain error resulting in manifest injustice

In view of the common use of the term "prosecuting attorney" to include assistants, there was no "plain" or obvious error in the trial court's not *sua sponte* dismissing the case. Further, Edwards has not shown manifest injustice; the assistant voted against finding that Edwards was a sexually violent predator, so it is difficult to see how there could be any

injustice to Edwards from the assistant's service. Therefore, Edward's point has no merit, and must fail.

Conclusion

In view of the foregoing respondent submits that the order of commitment should be affirmed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 26th day of October, 2001, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Nancy L. Vincent
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Appellate/PCR Division, Eastern District
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St. Louis, MO 63103

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 18,018 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____
Linda Lemke

APPENDIX